

DONALD ELDREDGE
Claimant

ELDREDGE WELL SERVICE
Respondent

TRAVELERS INSURANCE COMPANY
Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

[illegible]

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant suffered accidental injury on June 6, 1990, resulting in a 15 percent whole body functional impairment. Claimant was awarded a 17.5 percent general body work

disability from the Administrative Law Judge in the original Award of January 13, 1993. This award was the result of a 0 percent labor market loss and a 35 percent wage loss. This matter was affirmed by the Workers Compensation Director on June 1, 1993. On October 22, 1993, the Award was increased to a 25 percent permanent partial work disability to the body as a whole by the District Court. The Journal Entry does not disclose how the 25 percent was calculated.

On January 22, 1997, claimant filed an application for review and modification under K.S.A. 1989 Supp. 44-528 alleging he was no longer working and thus entitled to work disability. In connection with this application, claimant took the deposition of Dr. Pedro Murati on March 20, 1997. The original 1993 Award held that claimant had not established any loss of ability to perform work in the open labor market, but had established a 35 percent loss of ability to earn a comparable wage. In the June 27, 1997, Review and Modification Award, the Administrative Law Judge again found that claimant had not established any loss of ability to perform work in the open labor market. The Administrative Law Judge did, however, find that claimant suffered a 100 percent reduction in his ability to earn a comparable wage and awarded claimant a 50 percent general body disability, pursuant to K.S.A. 1989 Supp. 44-510e.

K.S.A. 1989 Supp. 44-528 allows review and modification of awards if:

. . . the director finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the director may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

In this instance, the date of accident is June 1990. K.S.A. 1989 Supp 44-510e controls the claimant's entitlement to work disability and states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced

Claimant, an oil-well pumper, had been employed in that capacity since his 1990 injury. However, it is significant that, prior to his 1990 injury, claimant worked on the oil rigs in the oil fields. Claimant began working as an oil well pumper after the 1990 injury at a reduced wage, resulting in the 35 percent loss of wage earning ability. This job was substantially easier than the work required on the oil rigs.

Claimant has been unemployed since September 1995 for various reasons. Claimant lost certain oil wells because he didn't have enough experience, other oil wells were shut down, and certain oil wells were lost, through divorce, to his wife. In no instance

was it shown that claimant lost the ability to work these oil wells as a result of a change in his physical condition stemming from his injury.

Dr. Murati, the only medical expert to testify regarding claimant's condition subsequent to the original award, testified that claimant had reached maximum medical improvement as of May 1995. When later asked if claimant's condition had changed since that time, Dr. Murati acknowledged that claimant's condition was the same as it was when he saw him in 1995. Dr. Murati went on to state that claimant had a bad result from the initial surgery performed by Dr. Tejano. When asked about the cause of claimant's current condition, Dr. Murati stated, "I can tell you that the reason he's in the shape he is in is because of the surgery." (Murati Depo., page 10.)

When asked if claimant had sustained a change in his condition, Dr. Murati stated that there was no change and that claimant was going to be like this for the rest of his life.

K.S.A. 1989 Supp. 44-510e obligates the fact finder to consider the "ability" of the employee to perform work in the open labor market and to earn comparable wages. The Award in 1993 found claimant had proven no loss in his ability to perform work in the open labor market. However, that Award, entered on January 13, 1993, and modified by the District Court on October 22, 1993, did not consider the deposition testimony of Jerry Hardin taken in November 1993. The report of Mr. Hardin was based in part upon a review of the medical records of Dr. Neonilo A. Tejano of July 9, 1991, and the medical reports of Dr. Robert A. Rawcliffe of October 23, 1991.

The testimony of Dr. Tejano was never taken in this matter. As such under K.S.A. 44-519, his medical opinion will not be considered. The deposition of Dr. Rawcliffe was, however, taken on December 20, 1991. Dr. Rawcliffe's medical report was partially the basis for the opinion of Mr. Hardin, and the limitations and restrictions placed upon claimant by Dr. Rawcliffe and Dr. Tejano are almost identical. The Appeals Board finds that the opinion of Mr. Hardin, based upon the report of Dr. Rawcliffe, would have been appropriate for the determination of claimant's loss of access to the open labor market had it been part of the original record.

After the 1990 injury, claimant returned to work as an oil pumper at \$300 per week, which represented the 35 percent loss of ability to earn comparable wages. This figure was originally used by the Administrative Law Judge in granting claimant a 17.5 percent permanent partial disability. However, this finding was modified by the District Court in its Journal Entry of October 22, 1993, wherein the District Court granted claimant a 25 percent permanent partial disability to the body as a whole, offering no explanation as to how that figure was computed.

The Appeals Board finds, based upon a review of the evidence, that claimant continues to suffer a 35 percent loss of ability to earn comparable wages as a result of the injuries suffered in this matter. That circumstance has not changed. While claimant has lost his income from these wells, he has suffered no additional loss of "ability" to earn comparable wages.

However, K.S.A. 1989 Supp. 44-510e obligates the fact finder to consider not only the loss of ability to earn wages, but also the loss of ability to perform work in the open labor market.

In considering the opinion of Jerry Hardin and the restrictions of Dr. Rawcliffe, the Appeals Board finds claimant had suffered a loss of access to the open labor market of 81 percent from the original injury.

It is significant that the original award by the Administrative Law Judge as well as the October 1993 District Court Award were decided without the benefit of the opinion of Mr. Hardin. While claimant's economic loss from the reduced wages was considered, the ability of the claimant to perform work in the open labor market was never provided to the fact finders.

In this instance, claimant's work disability was originally determined, after the injury, as to the wage loss factor only. Evidence regarding claimant's loss of ability to perform work in the open labor market was not in the record at the time of the original award. The Appeals Board, applying the logic of Lee v. Boeing Co.¹ to this circumstance, finds that claimant had also suffered a reduction in his ability to perform work in the open labor market of 81 percent. This 81 percent loss of ability to perform work in the open labor market existed at the time of the original award. This is not a circumstance where claimant's condition has changed. The opinion of Jerry Hardin, while provided in November 1993 after both the Director's award and the modification by the District Court in October 1993, is based upon medical records in existence in 1991. Mr. Hardin's opinion does not discuss a change of condition which would have occurred after the original award was made, but rather only discusses claimant's condition after the injury and before the award was actually written. In this instance, the 81 percent does not represent a change of condition, but rather represents the evidence available but not provided at the time of the original award.

K.S.A. 1989 Supp. 44-528 is intended to allow modification of an award by reason of a change in condition. It is intended to cover an award directed to the future. K.S.A. 1989 Supp. 44-528 is not intended to cover an award where the findings, upon which the award modification is claimed, were past facts.²

The original Director's decision in June 1993, found that claimant had failed to prove any work disability resulting from his loss of ability to perform work in the open labor market. The evidence simply was not in the record. The District Court in October 1993 was also provided no evidence of a loss of ability to perform work in the open labor market even though this loss existed at the time, and could have been provided.

¹Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

²Coffee v. Fleming Company, Inc., 199 Kan. 453, 430 P.2d 259 (1967).

K.S.A. 44-528 is not intended for the purpose of allowing parties to rectify past errors or omissions. It is intended for the purpose of showing a change in condition.³ The evidence presented in this case provides no change in condition subsequent to the original award. It merely shows what would have been available to the District Court and the Director had it been provided in a timely fashion.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on review and modification dated June 27, 1997, should be, and is hereby, reversed, and the original District Court Award of 25 percent to the body as a whole remains in full force and effect for the injury occurring on June 6, 1990.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent as follows:

Barber & Associates	
Transcript of motion hearing	\$155.00
Satterfield Reporting Services	
Deposition of Pedro A. Murati, M.D.	\$108.00

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Russell B. Cranmer, Wichita, KS
William L. Townsley III, Wichita, KS
Andrew E. Busch, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director of the District

³Honn v. Elliott, 132 Kan. 454, 295 Pac. 719 (1931).